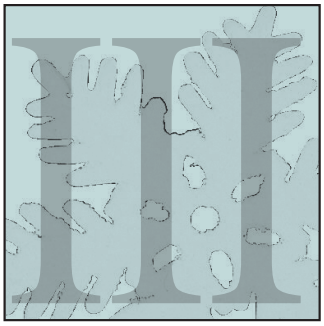
MICHIGAN DEFENSE
QUARTERLY

Volume 36, No. 3 - 2020



IN THIS ISSUE:

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright PLLC*, and Trent B. Collier, *Collins Einhorn Farrell P.C.*
pderosier@dickinsonwright.com; trent.collier@ceflawyers.com

Proper Scope of Amicus Briefs

When significant issues are pending before a court, especially an appellate court, it is common for interested parties to submit amicus briefs in order to offer their own unique perspective. In fact, one of the many important roles that the MDTC serves is to submit amicus briefs in cases impacting its members. Most courts welcome helpful amicus briefs. As the Michigan Supreme Court long ago remarked, "[t]his court is always desirous of having all the light it may have on the questions before it. In cases involving questions of important public interest, leave is generally granted to file a brief as amicus curiae." *City of Grand Rapids v Consumers' Power Co*, 216 Mich 409, 415; 185 NW 852 (1921). But what is the appropriate role of an amicus brief? May it raise new issues or inject new facts?

The Role of Amicus Briefs

The general rule is that a good amicus brief should strive to assist the court by shedding additional light on the questions before it, and not seek to raise new issues or expand the record on appeal. While it has sometimes been criticized as offering too narrow a view, then-Chief Judge Posner's in-chambers opinion in *Ryan v Commodity Futures Trading Comm*, 125 F3d 1062 (CA 7, 1997), is often cited for its overview of the criteria for a useful amicus brief. In Judge Posner's view, amici should offer "unique information or perspective that can help th[e] court beyond the help that the lawyers for the parties are able to provide." *Id.* at 1063. They should not merely "duplicate the arguments made in the litigants' briefs." *Id.* After all, "[t]he term 'amicus curiae' means friend of the court, not friend of a party." *Id.* See, e.g., *WildEarth Guardians v Zinke*, 368 F Supp 3d 41, 59 (DDC, 2019) (denying motion to file amicus brief because it did not offer anything beyond the parties' own briefs).

Limits on Amicus Briefs

There are also specific limits on amicus briefs that most courts recognize. Amicus briefs generally should not raise issues that haven't been raised by the parties. See *Burwell v Hobby Lobby Stores, Inc*, 573 US 682, 721 (2014) ("We do not generally entertain arguments that were not raised below and are not advanced in this Court by any party."); *Kinder Morgan Michigan, LLC v City of Jackson*, 277 Mich App 159, 173; 744 NW2d 184 (2007) ("'Absent exceptional circumstances, amicus curiae cannot raise an issue that has not been raised by the parties.'") (citation omitted).

There is, however, an oft-cited exception for important legal issues or policy questions. See, e.g., *Teague v Lane*, 489 US 288, 300 (1989) (addressing question of retroactivity raised in an amicus brief); *People v Hermiz*, 462 Mich 71, 76; 611 NW2d 783 (2000) (opinion of Taylor, J.) (citing *Teague* and observing that the prohibition against amici raising new issues "is not a hard and fast rule" and that "exceptional circumstances" may warrant it).

One area where Michigan courts and federal courts appear to diverge is when an issue is raised by an amicus and incorporated by a party into its own brief. In *Genova v Banner Health*, 734 F3d 1095 (CA 10, 2013), the Tenth Circuit opined that it would be appropriate for a court to address an argument if "a party has done something to incorporate the argument 'by reference' in its own brief." *Id.* at 1103. Compare that to the Michigan Court of Appeals' decision in *Ile v Foremost Ins Co*, 293 Mich App

Phillip J. DeRosier is a member in the Detroit office of Dickinson Wright PLLC, and specializes in the area of appellate litigation. Prior to joining Dickinson Wright, he served as a law clerk for Michigan Supreme Court Justice Robert P. Young, Jr. He is a past chair of the State Bar of Michigan's Appellate Practice Section. He can be reached at pderosier@dickinsonwright.com or (313) 223-3866.

Trent Collier is a member of the appellate department at Collins Einhorn Farrell P.C., in Southfield. His practice focuses on the defense of legal malpractice, insurance, and general liability claims at the appellate level. His e-mail address is Trent.Collier@CEFLawyers.com.

309; 809 NW2d 617 (2011), rev'd on other grounds 493 Mich 915 (2012). In that case, the court was critical of an appellant's attempt to "agree [with] . . . and incorporate [] by reference" in its reply brief two arguments raised by an amicus, finding the practice to be "lazy and sloppy." *Id*. at 328. In the Michigan appellate courts, the best practice would be to file a motion seeking to incorporate an amicus brief by reference. The Michigan Supreme Court recently granted such a motion in *People v Tillman*, 504 Mich 894; 928 NW2d 702 (2019).

When it comes to the record on appeal, amicus briefs that seek to "introduce new facts at the appellate stage" are generally disfavored. *Corrie v Caterpillar, Inc*, 503 F3d 974, 978 (CA 9, 2007). However, courts do typically distinguish between adjudicative facts (i.e., case-specific facts) and so-called "legislative facts" (social or scientific studies, statistics, and the like), the latter being commonly offered by amici in support of broad policy arguments. See, e.g., *State ex rel TB v CPC Fairfax Hosp*, 129 Wash 2d 439, 453; 918 P2d 497 (1996) (permitting amicus to offer "scholarly articles and excerpts" in connection with minor's constitutional challenge to her involuntary confinement at a mental hospital).

Conclusion

Amicus briefs can be a helpful resource to courts as they decide the important issues before them, so long as amici don't simply repeat the parties' arguments, raise new issues, or inject extra-record facts.

The idea is to update checklists as problems arise so they continually narrow the gap through which errors can slip.

If Checklists Help Surgeons, They Just Might Help Lawyers, Too

Atul Gawande, a surgeon at Brigham and Women's Hospital, seems to spend equal time in the operating room and on the New York Times' bestseller list. His writing usually focuses on medical issues, but he uses insights from medicine to address wider themes. His latest book, *Being Mortal,* proposes a fundamental shift in how we think about death and end-of-life care. The book that prompted this column, however, deals with a more mundane subject: checklists. It happens that Dr. Gawande has something to teach lawyers about how to be more effective in briefing and oral argument.

Dr. Gawande's Manifesto

The Checklist Manifesto,[1] originally published in 2009, is exactly what its title promises. It advocates for the use of checklists and demonstrates their utility. And Dr. Gawande's argument for using checklists is compelling.

He writes that there are two basic kinds of errors: those caused by ignorance and those caused by "ineptitude."[2] In the first category, we fail because we lack the necessary knowledge. In the second, "the knowledge exists, yet we fail to apply it correctly."[3] Dr. Gawande shows that, although medical and scientific knowledge has expanded at an almost exponential pace, serious, avoidable errors persist.

So the problem isn't knowledge; it's making sure we apply knowledge correctly. Using a checklist is a simple way to make sure we do so.

And it works. For example, *The Atlantic* cited a program at Veterans Affairs suggesting that the use of checklists reduced annual mortality by 18%.[4] The World Health Organization developed its own surgical checklist and reports that its use decreases mortality, surgical complications, and the length of hospital stays.[5]

Of course, simply writing a checklist isn't a panacea.[6] It requires consistent use—and a change of culture.

The Case for Legal Checklists

Lawyers face many of the same knowledge-management issues as doctors, including increasing specialization and complexity. Dr. Gawande notes a "36 percent increase between 2004 and 2007 in lawsuits against attorneys for legal mistakes—the most common being simple administrative errors, like missed calendar dates and clerical screw-ups, as well as errors in applying the law."[7]

And it's no wonder. We have to master an ever-widening body of substantive law. We have to put that knowledge into practice based on complicated court rules, local rules, and individual judges' practice guidelines. We have to do the work of zealously representing our clients—producing quality work, keeping track of deadlines, looking ahead for forks in the road—while spending time developing relationships that will lead to future cases. All the while, we're inundated with concentration-sapping emails, texts, and phone calls.

Modern law—modern *life*, for that matter—is a recipe for the second kind of error that Dr. Gawande identifies: those where we have the know-how and fail to employ it.

Many of these errors won't break a case. Forgetting to attach an exhibit, for example, may not destroy a client's legal position. But sometimes it might. Employing checklists might be a simple, cost-effective way for lawyers to cut down on errors. Indeed, some courts provide their own checklists. The Sixth Circuit Court of Appeals, for example, provides a checklist for briefs.[8]

Sample Checklists

Here, for example, is a checklist for filing a brief:

- ☐ Obtain client approval for filing
- ☐ Review relevant court rules or local rules
- ☐ Include each section required under court rules (e.g., questions presented, standard of review, etc.)
- ☐ Verify compliance with rules concerning formatting and page limits
- ☐ Proofread
- ☐ Check for misspellings that might evade spellcheck (e.g., names, "trail" instead of "trial," etc.).
- ☐ Proofread again
- ☐ Include request for oral argument if necessary
- ☐ Shepherdize/make sure all cases are current
- ☐ Verify that all exhibit references/pin cites direct reader to correct page
- ☐ Redact exhibits as necessary to preserve privilege and to comply with redaction rules
- ☐ Verify that exhibits are complete and legible

- ☐ Include relief requested
- ☐ Include proof of service that lists the necessary parties
- ☐ Verify that next date or task is calendared

Here's a sample checklist for oral argument:

- ☐ Make travel arrangements and verify location/time of argument
- ☐ Notify client of argument date/time
- ☐ Review briefs
- ☐ If there are other represented parties on your side of the "v," contact those attorneys to discuss division of allotted time.
- ☐ Review underlying record to prepare to answer factual questions
- ☐ Review key cases
- ☐ Update cases to determine whether any have been overruled, modified, or questioned
- ☐ Prepare outline for oral argument
- ☐ Research judges on panel to assess relevant jurisprudence
- ☐ Prepare references for oral argument (e.g., timeline, critical citations to record)
- ☐ Prepare list of possible questions from panel and short answers
- ☐ Analyze opponent's likely arguments and prepare rebuttals
- ☐ Prepare and memorize short introduction
- ☐ Verify court rules regarding use of electronics or visual aids

A checklist shouldn't be a static creation. The idea is to update checklists as problems arise so they continually narrow the gap through which errors can slip. And if that practice works for surgeons, maybe it can help us avoid errors like forgetting to request oral argument, accidentally attaching a privileged document, or being surprised by a question at oral argument that we should have anticipated.

Developing appropriate checklists, updating them, and using them consistently may require an investment of time. But, if the impact of checklists in the medical world is any guide, that time will be well spent.

Endnotes

1 Atul Gawande, *The Checklist Manifesto: How to Get Things Right* (Picador 2010). Dr. Gawade's book is based on his 2007 article for *The New Yorker*, which is available here: http://www.newyorker.com/magazine/2007/12/10/the-checklist

2 *Id.* at 8.

3 *Id.*

4 James Hamblin, *Save a Brain, Make a Checklist*, The Atlantic, March 17, 2014. Available at: http://www.theatlantic.com/health/archive/2014/03/save-a-brain-make-a-checklist/284438/ (last visited January 3, 2020).

5 http://www.who.int/patientsafety/safesurgery/faq_introduction/en/#Q4

6 See Hamblin, *supra,* describing a controversial study reported in the *New England Journal of Medicine*.

7 Gawande, *supra*, at 11.

8 See https://www.ca6.uscourts.gov/sites/ca6/files/documents/forms/Briefs%20Checklist_0.pdf (last visited January 3, 2020).